

Parshuram Narayan Madhav, ... Appellant

Versus

Shivaji Sitaram Madhav & Ors. Respondents

Mr. R.S. Ghadge, Advocate for the Appellants

Mr. A.S. Khandeparkar, Advocate for the Respondents

CORAM : ABHAY S. OKA, J.

DATE : 7TH AUGUST 2006

P.C.

1) Heard learned Advocates appearing for the parties. This appeal has been ordered to be finally heard at admission stage. Accordingly I have heard the appeal on the following substantial questions of law.

i) Whether the Respondent No. 1 was entitled to the decree of declaration of ownership only on the basis of an Agreement for Sale executed in his favour?

ii) Whether the Respondent No. 1 was entitled to decree of perpetual injunction even after he failed to prove ownership?

2) The Respondent No. 1 is the original plaintiff. The Respondent No. 1 had filed a suit for declaration that he was the owner of the suit land admeasuring 15 and 1/2 gunthas out of survey number 3, Hissa no. 1 situated at village Kinjawade, Taluka Deogad, District Sindhudurg. According to the case of the Respondent no. 1- Plaintiff, his father obtained the possession of the suit property as a tenant in the year 1968 from its original owner, Shri. Desai. It is his case that in the year 1976, an agreement for sale was executed in favour of his father by which original owner agreed to sell the suit property in his favour for the consideration of Rs.2000/-. It is an admitted position that sale-deed is not executed till today. The case of the plaintiff is that one Astrologer had advised his father not to enter into an agreement for sale either in his name or in the name of the plaintiff. The Appellant/ original defendant no.1 is the cousin of the Respondent no. 1- plaintiff. The Agreement was executed in favour of the Appellant. According to the case of the Respondent no. 1- Plaintiff, the agreement for sale was a Benami transaction. A prayer was made for declaration that the Respondent no. 1- plaintiff is the owner of the property and consequently a relief of perpetual injunction was prayed.

3) The suit was contested by the Appellant -

defendant no. 1. The Appellant denied the case made out by the Respondent no. 1- plaintiff. The Appellant contended that he himself was the tenant in respect of the suit property and the agreement for sale has been executed by the original owner in his favour for which consideration has been paid by the Appellant no. 1 from his own income.

4) The Trial Court decreed the suit and granted decree of perpetual injunction. The Appellate Court dismissed the appeal preferred by the Appellant herein.

5) The learned Advocate appearing for the Appellant submitted that the first Respondent failed to establish the case of the Benami transaction. He submitted that the first Respondent has failed to prove any right, title and interest in the suit property. He submitted that Appellant has been in possession of the suit property.

6) Shri. Khandeparkar, the learned Advocate appearing for the first Respondent submitted that though the original owner was a party - defendant to the suit, he has not objected to the decree of the trial Court. He submitted that even if decree of declaration is not granted in favour of the first Respondent, the decree of injunction will have to be maintained as the first Respondent is in possession of the suit property.

7) I have considered the submissions. The first Respondent-plaintiff has claimed that his father had obtained tenancy in respect of the suit property from the original owner and thereafter an Agreement for Sale in respect of the suit property was executed in favour of first Respondent's father by the original owner. The specific case of the first Respondent is that due to advice given by one Astrologer, the name of the present Appellant was shown as the purchaser in the Agreement for Sale. Admittedly there is no sale-deed executed by the owner in favour of either the Appellant or the first Respondent. It is not in dispute that value of the suit property is much more than Rs.100/-. Therefore, in view of the provisions of The Transfer of Property Act, 1882, a sale could have been executed by the original owner only by executing a registered deed of conveyance. In the present case, the owner has executed only an agreement of sale which does not create any interest in the property in view of Section 54 of the said Act of 1882. Even assuming that the case of the Benami transaction was established by the first Respondent, the Courts below could not have recorded a finding that ownership has been transferred by the original owner Shri Desai in favour of the first Respondent or his father. Thus the first Respondent was not entitled to a decree of declaration of ownership.

8) As Agreement for Sale does not create any interest in the property, it is not necessary to deal with the plea of Benami transaction as pleaded by the first Respondent.

9) The substantive relief claimed in the suit by the first Respondent was of declaration of the ownership. A Prayer for perpetual injunction was by way of a consequential relief. The question is if the first Respondent is not entitled to the decree of declaration, whether he is entitled to consequential relief of injunction.

10) Shri. Khandeparkar pointed out that both the Courts below concurrently held that the first Respondent- Plaintiff is in possession of the suit property and therefore decree for perpetual injunction cannot be disturbed.

11) The first Respondent has not filed a suit simplicitor for protecting his possession from illegal dis-possession at the hands of the defendant. The prayer for perpetual injunction is based on the title as the exclusive owner of the suit property. As held earlier, the first Respondent cannot claim ownership. If the first Respondent fails to establish his ownership, it is obvious that he will not be entitled to consequential relief of decree of perpetual injunction as the relief of injunction is sought on the

basis of his alleged title as an owner. Therefore, in my view, the trial Court committed an error by passing a decree in favour of the first Respondent. The said decree deserves to be set aside. Hence, I pass following order.

O R D E R

- 1) The second appeal is allowed.
- 2) The impugned Judgments and decrees are quashed and set aside and Regular Civil Suit No. 2 of 1984 filed by the first Respondent stands dismissed.
- 3) There will be no order as to costs throughout.
- 4) C.A. No. 985 of 2002 does not survive and is rejected.

(ABHAY S. OKA, J.)